2004

Forest Meadow Ranch Property Owners Association, L.L.C. v. Pine Meadow Ranch Home Association (also known as Pine Meadow Ranch Home Owners Association and as Pine Meadow Ranch Association: Reply Brief

Utah Court of Appeals

Edwin C. Barnes; Clyde, Snow, Sessions & Swenson; Attorney for Respondent/Appellee.
Boyd Kimball Dyer; Attorney for Petitioner/Appellant.

IN THE UTAH COURT OF APPEALS

FOREST MEADOW RANCH PROPERTY OWNERS ASSOCIATION, L.L.C.,	ON APPEAL FROM THE UTAH THIRD DISTRICT COURT – SUMMIT COUNTY -
Petitioner/Appellant,	The Honorable Bruce L. Lubeck
vs.	
	Appellate Case. No. 200430397–CA
PINE MEADOW RANCH HOME ASSOCIATION (also known as PINE MEADOW RANCH HOME OWNERS ASSOCIATION and as PINE MEADOW RANCH ASSOCIATION,	Trial Court Case No. 00060092 PR
Respondent/Appellee	

APPELLANT'S REPLY BRIEF

Edwin C. Barnes, Esq. (No. 217)
Attorney for Respondent/Appellee
Clyde Snow Sessions & Swenson
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111 - 2216

Boyd Kimball Dyer, Esq. (No. 944)
Attorney for Petitioner/Appellant
664 Northcliffe Circle
Salt Lake City, Utah 84103

Forest-AppellantsReply

IN THE UTAH COURT OF APPEALS

FOREST MEADOW RANCH PROPERTY OWNERS ASSOCIATION, L.L.C.,	ON APPEAL FROM THE UTAH THIRD DISTRICT COURT – SUMMIT COUNTY -
Petitioner/Appellant,	The Honorable Bruce L. Lubeck
vs.	Appellate Case. No. 200430397–CA
PINE MEADOW RANCH HOME ASSOCIATION (also known as PINE MEADOW RANCH HOME OWNERS ASSOCIATION and as PINE MEADOW RANCH ASSOCIATION,	Trial Court Case No. 00060092 PR
Respondent/Appellee	

APPELLANT'S REPLY BRIEF

Edwin C. Barnes, Esq. (No. 217)
Attorney for Respondent/Appellee
Clyde Snow Sessions & Swenson
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111 - 2216

Boyd Kimball Dyer, Esq. (No. 944)
Attorney for Petitioner/Appellant
664 Northcliffe Circle
Salt Lake City, Utah 84103

TABLE OF CONTENTS

This Brief is organized in two parts. The first part covers the issues raised by Petitioner/Appellant in its opening brief. The second part covers the new issues raised by Respondent/Appellee in its Appellee's Brief.

12. Petitioner's action is timely because until the Special Service District was dissolved in March of 2000, Respondent was not making any assessments. 26

TABLE OF AUTHORITIES CITED

Cases

ADDENDUM DOCUMENTS.

Petitioner includes as addendum document "12" copies of all the statutes cited in this Reply Brief.

Petitioner includes as addendum document "13" a copy of the Trial Court's Ruling and Order of Mar. 22, 2004.

ARGUMENTS – PART 1: PETITIONER'S ORIGINAL ISSUES.

1. The Fabricated 1971 CC&R's are invalid under the Utah Statute of Frauds because they were not "subscribed."

Respondent/Appellee concedes that the Fabricated 1971 CC&R's were created by taking the Original 1971 CC&R's and altering the property description.[1] Respondent claims that they were fabricated by Deseret Diversified, but nothing in the record shows who was responsible. Respondent argues that the alteration is valid because it was "obviously corrective"[2] without mentioning the statutory requirement that a document must be "subscribed"[3] to be valid.

Respondent would have this Court hold that a valid deed can be created by taking an existing deed, changing the property description, and recording the altered deed without having it subscribed by the grantor so long as it is "obviously corrective." Petitioner replies there is no statutory exception for deeds that are "obviously corrective" and the *Perkins* case[4] expressly holds that a deed must be complete before it can be "subscribed".

---

[1] Respondent/Appellee's Brief, p. 27, lines 6 - 19.

[2] Id., p. 27, line 9.

[3] Utah Code Ann. sec. 25 - 5 - 1 (1998) ("Utah Statute of Frauds").

[4] Utah State Building & Loan Ass'n v. Perkins, 53 Utah 474, 173 P. 950 (1918), discussed in Petitioner/Appellant's Opening Brief, pp. 23 - 24.

There are strong policy reasons for this Court requiring a subscribed corrective deed in accordance with the 2002 Utah Supreme Court decision in *Arnold Industries*.[5] First, a corrective deed assures that the original grantor agrees there was a mistake. Under Respondent's "obviously corrective" test, the grantee alone can "correct" a property description and record the altered deed without the grantor even knowing about it. Secondly, a corrective deed makes it clear that the original deed is no longer effective. This prevents situations like that in this case where the Original 1971 CC&R's still encumber the southern half of the section where the Summit County Justice Center is located. Thirdly, the "obviously corrective" test cannot be applied consistently in the marketplace. The law of deeds is applied in the marketplace by buyers and sellers. They can consistently apply the statutory bright line test of subscription, but reasonable buyers and sellers may disagree on whether a fabricated deed is "obviously corrective." Finally, the "obviously corrective" test will invite the fraudulent alteration of deeds, as pointed out by Petitioner in its opening brief.

2. ***Descriptio* personae applies because the extrinsic evidence does not prove that a trust existed in 1965 and that Deseret Diversified was its**

---

[5] Arnold Industries v. Love, 2002 UT 133, 62 P.3d. 721. Cited in Petitioner/Appellant's Opening Brief p. 25.

beneficiary in 1971.

Petitioner and Respondent agree that under the doctrine of *descriptio personae* the word "trustee" must be disregarded in the 1965 Bates Deed unless the extrinsic evidence shows there actually was a trust in 1965 and that Desert Diversified was its beneficiary in 1971.

The most compelling extrinsic evidence that Desert Diversified was not the trust beneficiary is that it did not exist in 1965 when the Bates deeded the land to "Security Title Company, Trustee." Deseret Diversified was not incorporated until March 18, 1971, five and a half years later. If there were a trust, Deseret Diversified could not have been its beneficiary. At the other end of the time scale, after Deseret Diversified was dissolved in September 1974[6], Security Title continued to execute documents using the word "trustee" after its name.[7] Again, Deseret Diversified could not have been the beneficiary.

The trial court ignored that evidence without explanation and relied on the following "evidence" to hold as a matter of law that a trust existed and that Deseret Diversified was its beneficiary:

---

[6] The certificate of dissolution is in the record at R-00295.

[7] For example, the Plats for Pine Meadow Ranch Plats "E,"" F,"" G" and "I," which Security Title executed in 1987, in the record of the companion Peters case at R-0444 - 0451.

(1) The fact that the grantee was "Security Title" because, the trial court reasoned, "a title company often holds title to property as trustee."[8]

The trial court confused two types of "trustees" – (1) a trustee under a trust deed and (2) a classic trustee who possesses and manages property for the benefit of a beneficiary. All title companies hold title to property as trustees under trust deeds. In this role they hold title as security for the beneficiary (the lender) while the trustor (the debtor) possesses and manages the property. But, a title company cannot lawfully possess and manage property for the benefit of another person because this would be conducting "trust business," and title companies are not allowed to conduct "trust business."[9] The 1965 Bates Deed is a warranty deed, not a trust deed, so if there really were a trust, Security Title would have been conducting trust business. In any case, there is no judicially recognized exception from *descriptio personae* for grantees who "often" act as classic trustees.

---

[8] Trial Court's Ruling and Order of March 22, 2004, p. 13, R.00378. A copy of the Ruling and Order is attached as Addendum Document "13."

[9] Compare Utah Code Ann. sec. 7 - 5 - 1 et seq. (1999)(2004 Pocket Part) dealing with who can conduct "trust business, with Utah Code Ann. sec. 57 - 1 - 21 (2000) dealing with who can be a trustee under a deed of trust. In 1965 there was no statutory prohibition on a title company conducting "trust business," but the "fact" that title companies were routinely conducting trust business in 1965 is beyond the scope of judicial notice under Utah Rule of Evidence 201(b) (facts "generally known within the territorial jurisdiction of the trial court").

The trial court also relied on what it called the fact that "the recorded plat map reflected Deseret [Diversified] as **the** owner of the property and Security Title as trustee." [10] (Bold faced emphasis added).

The trial court's "fact" is simply not true. The owner's dedication on the plat does not describe Desert Diversified as **the** owner. It expressly says there are four owners without saying what their respective interests are. The word "trustee" appears only as part of Security Title's name, but the owner's dedication on the plat expressly describes it as one of four "owners." The trial court treats the word "trustee" in the name "Security Title Company, trustee" as extrinsic evidence that a trust actually existed. But, whenever the word "trustee" appears as part of a name, it is not "extrinsic." "Extrinsic evidence" means evidence other than use of the word trustee as part of a name. The law presumes that the use of the word "trustee" as part of a name is merely descriptive.

Actually, the evidence of the plat tends to show that Deseret Diversified was not a trust beneficiary. It tends to show that Deseret Diversified had (or expected to have) a direct ownership interest in the streets.

(3) Finally, the trial court treated as evidence the fact that Deseret said it

---

[10] Ruling and Order p. 13, addendum doc. "13."

was the owner in the Fabricated 1971 CC&R's.[11] The major flaw in the trial court's reasoning is thinking that "owner" and "trust beneficiary" are the same thing. They are not. The trustee is the "owner" of the assets held in trust both in law and in popular speech. The beneficiary does not have possession and power of disposition, the chief elements of ownership. If Deseret Diversified had actually been a trust beneficiary, it would have said so.

Another flaw in the trial court's reasoning is ignoring the element of time. The Fabricated 1971 CC&R's were recorded on August 19, 1971. It is on that date that Respondent must prove by extrinsic evidence that Deseret was the trust beneficiary. The Plat was recorded a year later on August 9, 1972. The plat is not competent evidence of the state of title a year earlier.

Finally, the trial court ignored the element of space. The Fabricated 1971 CC&R's cover the south half of section 22, T1N, R4E, SLB&M. The plat does not cover this area, but only a part of it, and the plat spreads out into section 21 and the north half of section 22. Was Deseret Diversified the trust beneficiary with respect to the land covered by the plat or with respect to the south half of section 22? If it owned the land covered by the plat, why did it try to impose the Fabricated 1971 CC&R's on the land in the south half of section 21 not covered

---

[11] Ruling and Order p. 13, addendum doc. "13."

by the plat?

3. Respondent does not show how a trust beneficiary can be in privity of estate with a successor in interest to the trustee.

In its Opening Brief, Petitioner shows that a trust beneficiary is not in "privity of estate" with the trustee's successors in title. Respondent tries to counter this point by denying that Security Title held the land in question in fee simple estate.[12] This is contrary to Utah statutory law. The 1965 Bates Deed is a warranty deed. By statute, the effect of a warranty deed is to convey the land in fee simple to the grantee.[13] Whether the grantee is a trustee or not makes no difference under the statute. It follows that Security Title held the only "estate" in the land – the fee simple estate – and Deseret Diversified could not be in "privity of estate" with anyone.

4. Respondent has no answer for Petitioner's point that a trust beneficiary has no power to dispose of assets held in trust.

An essential step in the reasoning of the trial court was its holding that a trust beneficiary has the power to impose CC&R's on the real property held for its

---

[12] Respondent/Appellee's Brief, p. 38, lines 1 - 2: "Security Title did not hold title in fee simple, ..."

[13] Utah Code Ann. sec. 57-1-12 (2000) ("Form of warranty deed – Effect").

benefit in trust. In Petitioner's opening brief, Petitioner shows that a trust beneficiary has no such power under Utah's general law of trusts.

Respondent deals with Petitioner's point in a footnote[14] by pretending that the *Capital Assets* decision[15] holds that a beneficiary has such a power. Respondent must be counting on this Court not actually reading the *Capital Assets* decision. It has nothing to do with the powers of trust beneficiaries. It holds that under the Utah Judgment Lien Act a judgment against a trustee is not a statutory lien against the property held by the trustee in trust.

In the footnote the Respondent pretends that the consequences of this Court holding that a trust beneficiary has a power of disposition of the assets held in trust (the "parade of horribles") will not occur because the issue in this case is whether Deseret Financial is the "owner" of the property. Respondent could not be more wrong. What would cause the parade of horribles is for this Court to hold there is no difference between "owner" and "trust beneficiary." If this Court does not make any distinction between "owner" and "trust beneficiary," then neither will people who deal with the beneficiary, the bankruptcy trustees and the IRS.

---

[14] Respondent's Brief, p. 33, n. 13.

[15] Capital Assets Financial Services v. Maxwell, 994 P.2d 201 (Utah 2000), cited in Respondent/Appellee's Brief, p. 33, n. 13.

5. No court would accept Respondent's argument that the doctrine of uniformity does not require that CC&R's be reasonably uniform over a given subdivision (but only over whatever property they cover), because it would defeat the purpose of the doctrine.

In Petitioner's opening brief, it shows that the various CC&R's do not cover Forest Meadow Plat D subdivision in a reasonably uniform manner. The western portion of the subdivision is purportedly covered by the 1973 CC&R's (which appear to have been intended for the Pine Meadows Subdivisions), the northeastern portion of the subdivision is covered by no CC&R's at all, and the southeastern portion by the Fabricated 1971 CC&R's, splitting Petitioner's lot.

In response, Respondent argues that the doctrine of uniformity only requires uniformity over whatever land happens to be covered by a given set of CC&R's, not uniformity over a given subdivision.

No court would accept Respondent's argument because it would defeat the purpose of the doctrine – to assure that all the lots in a subdivision are treated fairly. Under Respondent's rule, a subdivision could be made subject to unfairly non-uniform CC&R's by the simple expedient of using multiple CC&R's each covering a different portion of the subdivision. For example, in this case it is unfair for money collected from the subdivision lot owners in the western portion

of the subdivision which is purportedly covered by the 1973 CC&R's (which provide for annual maintenance assessments made by lot)[16] to be used for the benefit of the lots in the southeastern portion which is purportedly covered by the Fabricated 1971 CC&R's (which provide only for assessments for capital improvements by acreage as opposed to by lot)[17] and for the benefit of the lots in the northeastern portion which are subject to no assessments at all because they are covered by no CC&R's at all.

Respondent tries to meet this point by saying that "the Association's assessments are uniform throughout the various Pine Meadow and Forest Meadow Subdivisions."[18] Hold on a minute. Respondent is asking this Court to validate the Fabricated 1971 CC&R's while at the same time it is admitting that it is not honoring them. Respondent knows that the Fabricated 1971 CC&R's do not provide for annual maintenance assessments made by lot, and it knows it has no right to make assessments on the lots in the northeastern portion of the subdivision. But, it is using the 1980 Notice of Lien to justify its making annual

---

[16] 1973 CC&R's pp. 4 - 8, in companion Peters case, addendum doc. "3."

[17] Fabricated 1971 CC&R's, p. 3, para. 3, addendum doc. "4."

[18] Respondent/Appellee's Brief, p. 42, lines 18 - 19; also p. 13, line 20 to p. 14, line 2.

maintenance assessments against all the lots.

PART 2: RESPONDENT'S NEW ISSUES.

Respondent raises four new issues in its brief. In this part, Petitioner responds to Respondent's arguments with respect to those new issues.

6. Petitioner Forest Meadow has standing to challenge the Fabricated 1971 CC&R's and the 1980 Notice of Lien because the fact that it had constructive and actual notice does not diminish the rights it received from its grantor.

Respondent argues that Petitioner cannot challenge the 1971 CC&R's and the 1980 Notice of Lien because it bought the lot with actual and constructive notice of them. Respondent points to the language in the deeds in Petitioner's chain of title that conveys the lot "subject to easements, restrictions and rights of way currently of record, and general property taxes for the year 1996 and thereafter."[19] Respondent also points to Mr. Peter's affidavit where Mr. Peters (Petitioner's attorney at the time) admits that he knew of the 1971 CC&R's and the 1980 Notice of Lien when Petitioner bought the lot. Respondent asks this Court to hold that the effect of buying land with notice of a wrongful lien is to

---

[19] Quoted from the 1998 deed from Liftos to Grabowski, addendum doc. "9" in Petitioner's Opening Brief.

validate the lien because the purchaser with notice will have no "standing" to challenge the wrongful lien.

By statute, the effect of the "subject to" language in warranty deeds is only to limit the covenants given by the grantor.[20] By that same statute, the grantor transfers to the grantee "the premises therein named together with all the appurtenances, rights, and privileges thereunto pertaining." One of those rights, of course, is the grantor's right to challenge wrongful liens.

The question of the meaning of the "subject to" clause in a warranty deed was decided by the Utah Supreme Court in 1990 in *Hancock v. Planned Development Corp.* . A grantor conveyed land to Hancock by a deed that provided it was "subject to the fence line encroachment along the east line." This referred to land within the deed's property description but east of a fence. The land east of the fence was in the possession of Planned Development. Hancock sued Planned Development to clear title to that land. The trial court held that the grantor had not conveyed the land east of the fence to Hancock, interpreting the "subject to" clause as a reservation of ownership by the grantor. Hancock appealed. Planned Development did not argue that the effect of the "subject to" clause was to deny

---

[20] Utah Code Ann. sec. 57 - 1 - 12 (2000) ("Form of warranty deed – Effect").

Hancock "standing" to challenge its rights, but defended on the grounds of boundary by acquiescence. The Utah Supreme Court reversed the trial court and held that under the statute the only effect of the "subject to" language in a warranty deed was to limit the covenants given by the grantor. The Court held that under the statute the effect of the warranty deed was to convey all grantor's rights in the land covered by the property description to Hancock.

It is true that the Utah Supreme Court did not expressly consider Respondent's "standing" argument in *Hancock*, but the issue was raised by the facts and implicitly rejected. Hancock was permitted to challenge Planned Development's claims.

If this Court adopts the standing rule advocated by Respondent, conveying property subject to a wrongful lien by warranty deed will have the effect of validating the wrongful lien. The reason is that a clause similar to "subject to encumbrances of record and the lien of current and future taxes not yet due and payable" appears in virtually every warranty deed. Without this clause, by statute the grantor covenants against any and all liens and encumbrances whatsoever (whether of record or not). But, the same statute provides that "any exceptions to these covenants may be briefly inserted in the deed following the description of

the land."[21] So, competent drafters always "insert" the "subject to" clause after the property description.

Under the same statute, a warranty deed has the effect of the grantor transferring to the grantee the right to challenge any lien or encumbrance, rightful or wrongful lien, of record or not of record, known or unknown, as illustrated by the *Hancock* decision. This means grantees may safely ignore wrongful liens if they think challenging them is not worth the expense of litigation. For example, in this case Respondent's rights, if any, under the Fabricated 1971 CC&R's were moot until the year 2000 because the Special Service District was providing all the area services and Respondent was not making any assessments.

7. The presumption of correctness for statements of fact in recorded documents provided by Utah Code Ann. sec. 57-4a -4 (1) (j) does not apply to claims of ownership because ownership is not a "fact" within the meaning of the statute.

Respondent argues that because Deseret Diversified says it is the owner of the property covered by the Fabricated 1971 CC&R's, a recorded document, under the presumption of Utah Code Ann. sec. 57-4a-4(1)(j), this Court must hold that

---

[21] Utah Code Ann. sec. 57 - 1 - 12 (2000) ("Form of warranty deed – Effect").

Deseret Diversified was the owner unless Petitioner proves otherwise by "clear and convincing evidence." Section 57-4a-4(1)(j) creates a presumption that "recitals and other statements of fact in a [recorded] document including without limitation recitals concerning mergers or name changes of organizations are true."

Petitioner replies that the legislature never intended the statutory presumption to apply to claims of ownership, but only the sort of "facts" of the sort illustrated by the statute (facts as to mergers or name changes of organizations, etc.). Changes of ownership are made by recorded deed so they automatically appear in the record. There is no need for a presumption. But, name changes are not automatically recorded. A presumption is needed.

Petitioner also replies that "owner" is not the same thing as "trust beneficiary" at law or in popular speech. If Deseret Diversified had declared in the Fabricated 1971 CC&R's that it was the beneficiary of the trust established by the 1965 Bates Deed, its declaration would be relevant. But, it declared it was the "owner." Deseret Diversified's declaration of ownership is evidence it was not a trust beneficiary. If it had been a trust beneficiary, it would have said so.

The consequences of this Court interpreting Utah Code Ann. sec. 57-4a-4 (1)(j) to apply to claims of ownership would be that no record owner would be secure. Any stranger could record a document stating the "fact" that it was the

true owner of the property and put the record owner to the demanding test of proving ownership by clear and convincing evidence. The lot owners in the area covered by the Fabricated 1971 CC&R's would be the first to feel those consequences. They may have lost their land to whoever is the successor in interest to Deseret Diversified, the presumed owner[22] under Respondent's test.

8. The 1980 Notice of Lien is a statutory "wrongful lien" because at the time it was recorded it was not signed by the then owner of the real property – Security Title.

Respondent argues that the 1980 Notice of Lien is not a statutory wrongful lien as to Petitioner because Petitioner did not own the lot at the time the 1980 Notice of Lien was recorded. Respondent must be counting on this Court not actually reading the statute. The statutory definition of a wrongful lien is "any document that purports to create a lien or encumbrance on an owners interest in certain real property and at the time it is recorded or filed is not : . . . (c) signed by or authorized pursuant to a document signed by the owner of the real

---

[22] The trial court prevented this consequence by holding that since Deseret Diversified was a trust beneficiary, Security Title as trustee had the power to convey the property free of Deseret Diversified's beneficial interest. See Utah Code Ann. sec. 75 - 7 - 816 (1) (1993)(2004 pocket part) (enacted by L, 2004, ch. 89, sec. 97, eff. July 1, 2004) and its predecessor, Utah Code Ann. sec. 75 - 7 - 406 enacted by L. 1975, ch. 150, sec. 8).

property."[23] The relevant owner is the owner "at the time the document is recorded or filed." In contrast, the statute provides that the petitioner must be a person "who possesses a present, lawful property interest" in the property.[24]

The consequence of this Court holding that only people who own property at the time the wrongful lien is filed may use the remedies provided by the Utah Wrongful Lien Act would be to defeat the legislative purpose of providing a speedy, summary method to get rid of wrongful liens.

9. The 1980 Notice of Lien is a statutory wrongful lien because it purports to create a new lien, not merely to republish the lien of the Fabricated 1971 CC&R's.

Respondent argues that the 1980 Notice of Lien is not a wrongful lien because it does not purport to create a new lien, but "merely restates and republishes"[25] the Fabricated 1971 CC&R's. Respondent must be counting on this Court not actually reading the documents. The only lien the Fabricated 1971 CC&R's purport to create is a lien for remedial expenses (e.g., if a lot owner builds a non-conforming improvement and the Association removes it, the

---

[23] Utah Code Ann. sec. 38 - 9 - 1 (2001) (definition of "wrongful lien").

[24] Utah Code Ann. sec. 38 - 9 - 1 (2001) (definition of "interest holder").

[25] Respondent/Appellee's Brief, p.44, line 21.

Association has a lien for its remedial expenses).[26] The 1980 Notice of Lien claims "a continuing lien . . . for the payment of annual maintenance assessment, annual water share fees, special maintenance assessments, penalties and interest on any or all of said items."[27] The 1980 Notice of Lien goes far beyond the Fabricated 1971 CC&R's. Respondent is currently relying on it in making assessments that it knows are not authorized by the Fabricated 1971 CC&R's.

10. The issue of whether the 1980 Notice of Lien is a wrongful lien is ripe for judicial determination because it encumbers Petitioner's lot.

Respondent argues that the question of whether the 1980 Notice of Lien is a wrongful lien is not ripe for decision because "[t]he Association has never attempted to collect assessments from Forest Meadows by lien foreclosure."

Petitioner replies that the Utah Wrongful Lien Act expressly authorizes the filing of a petition by it as the present record owner of property "against which a wrongful lien has been recorded." It does not say "against whom a wrongful lien is being enforced." It is also relevant that under Utah Code Ann. section 78 - 40 - 1, an owner can challenge a lien as invalid without waiting for the lien claimant to

---

[26] Fabricated 1971 CC&R's (Addendum Doc. "4" in Petitioner's Opening Brief) p. 3, para. 19.

[27] 1980 Notice of Lien (Addendum Doc. "8" in Petitioner's Opening Brief).

seek to enforce the lien. The general legislative policy is to permit property owners to clear their titles of wrongful liens without waiting for the lien claimants to enforce their liens.

The consequences of this Court adopting Respondent's non-statutory rules would be disastrous for property owners. Under Respondent's "ripeness" rule, a property owner will not be able to challenge a wrongful lien until the lien claimant seeks to enforce it. But, under Respondent's "standing" rule any successor in interest with notice will become bound by the wrongful lien by lack of "standing." The wrongful lien claimant will just wait patiently for the property to be sold and then enforce the lien.

11. Petitioner's action is timely because the applicable statute of limitations for challenging an lien is four years from the last assessment – and there is a pending assessment right now.

The trial court held that Petitioner's action was "untimely." The trial court did not explain its holding in terms of the applicable statute of limitations, but the statutory standard for timeliness is the statute of limitations.

The Utah Supreme Court covered the issue of the applicable statute of limitations in 2002 in *State of Utah v. Huntington-Cleveland Irrigation Co.*.[28] In

[28] 2002 UT 75, 52 P.3d 1257.

that case, an irrigation company made an assessment against land owned by the Utah Division of Wildlife Resources, one of its shareholders. The DWR challenged the assessment on the grounds that the amendment to the articles of incorporation under which the assessment was made was invalid. The trial court ruled that because the amendment to the articles of incorporation had been made more than four years before the DWR filed its action (four years being the statutory period of limitations for an action based on a written contract[29]), the statute of limitations had run against the DWR.

The Utah Supreme Court reversed and held that the statute expressly provided that the period was four years after the last assessment, and since DWR was challenging a current assessment, its action was timely.

> "[W]henever [the irrigation company] makes a new assessment under the purportedly unlawful mechanism, a new cause of action accrues on that individual assessment, permitting the statute of limitations on the newly arisen cause of action to run from the date of the new assessment. Inasmuch as DWR alleges that [the irrigation company's] assessments were made pursuant to an unlawful mechanism, DWR can assail the assessments by challenging the mechanism upon which the assessments are based."[30]

In this case, Petitioner is assailing Respondent's right to make assessments

---

[29] Utah Code Ann. sec. 78 - 12 - 25 (2002) ("Within four years").

[30] 2002 UT 75, para.19, 52 P.3d at 1262-63. Footnotes and citations omitted.

by challenging the mechanisms upon which the assessments are based – the Fabricated 1971 CC&R's and the 1980 Notice of Lien. Regardless of how long these documents have been on the books, Petitioner can challenge these mechanisms now because there is now a pending assessment.

12. Petitioner's action is timely under equitable principles because Respondent did not begin to make assessments until after the Special Service District was dissolved in March of 2000, and Petitioner brought this action that same month.

The trial court held Petitioner's action was untimely because of the length of time the Fabricated 1971 CC&R's had been on the record – since August of 1971. But, Respondent made no assessments until after the Special Service District was dissolved in March of 2000. Although the Fabricated 1971 CC&R's were on the books long before that date, it was not worth the cost of litigation to remove them. They had been a dead letter for twenty-nine years.

If this Court remands this case for trial on this issue, Petitioner's evidence will show that in the mid 1980's, a question arose of how to pay for maintaining the roads, water, and other services in the Pine Meadow and the Forest Meadow subdivisions. Assessing the lots under the various CC&R's was impractical for two reasons – the CC&R's had not been properly signed and they were not

uniform. So, some lot owners petitioned Summit County to set up a special service district to include all the subdivisions, making the validity of the various CC&R's moot and permitting uniform assessments by lot. The county set up the special service district and initially all went well. But, the character of the subdivisions began to change as more and more people became year-round residents. In 1999 a conflict arose between the residents (who wanted year round services and assessments to pay for them) and the non-residents (who wanted seasonal services and minimal assessments). At the time, the advisory board of the special service district was composed entirely of non-residents, and the residents complained to the county that the advisory board was supposed to be composed of residents. The county's response was to dissolve the special service district. The non-residents were (and still are) a majority of Respondent's membership, so they decided to use the various CC&R's and the 1980 Notice of Lien to continue their control over the subdivisions and to deny the residents year round services.

Petitioner is aligned with the residents. It wants services to be provided year round by a new special service district that will include not only all the Forest Meadow and Pine Meadow subdivisions, but also all the other subdivisions and properties in the Tollgate Canyon area. Ironically, it is Respondent who wants to

go on providing these services for free to the property owners outside the subdivisions.

The trial court relied on "equity" as one of the grounds for its decision, but one of the basic principles of equity is that it "follows" the law, supplementing but not defeating legal rights. Petitioner filed its action as soon as Respondent asserted the power to assess under the 1980 Notice of Lien. The action is timely under the applicable Utah Statute of Limitations. Respondent has shown no prejudice that would justify a defense of laches or waiver. This Court should hold that equity does not defeat Petitioner's rights under the law.

Dated: November 19, 2004

Respectfully submitted:

/s/ Boyd Kimball Dyer
ATTORNEY FOR PETITIONER/APPELLANT

CERTIFICATE OF SERVICE

I certify that on the following date I served two copies of the foregoing Reply Brief by depositing the same in the U.S. Postal Service, first class postage prepaid, addressed to the following person:

Mr. Edwin C. Barnes, Esq.
Attorney for Respondent/Appellee
Clyde Snow Sessions & Swenson
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111 – 2216

Dated: November 19, 2004

/s/ Boyd Kimball Dyer

ADDENDUM DOCUMENT "12" – Statutes Cited

TRUST BUSINESS

7-5-1. Definitions — Allowable trust companies — Exceptions.

(1) As used in this chapter:

(a) "Business trust" means an entity engaged in a trade or business that is created by a declaration of trust that transfers property to trustees, to be held and managed by them for the benefit of persons holding certificates representing the beneficial interest in the trust estate and assets.

(b) "Trust business" means, except as provided in Subsection (1)(c), a business in which one acts in any agency or fiduciary capacity, including that of personal representative, executor, administrator, conservator, guardian, assignee, receiver, depositary, or trustee under appointment as trustee for any purpose permitted by law, including the definition of "trust" set forth in Subsection 75-1-201(53).

(c) "Trust business" does not include the following means of holding funds, assets, or other property:

(i) funds held in a client trust account by an attorney authorized to practice law in this state;

(ii) funds held in connection with the purchase or sale of real estate by a person authorized to act as a real estate broker in this state;

(iii) funds or other assets held in escrow by a person authorized by the department in accordance with Chapter 22 or by the Utah Insurance Department to act as an escrow agent in this state;

(iv) funds held by a homeowners' association or similar organization to pay maintenance and other related costs for commonly owned property;

(v) funds held in connection with the collection of debts or payments on loans by a person acting solely as the agent or representative or otherwise at the sole direction of the person to which the debt or payment is owed, including funds held by an escrow agent for payment of taxes or insurance;

(vi) funds and other assets held in trust on an occasional or isolated basis by a person who does not represent that he is engaged in the trust business in Utah;

(vii) funds or other assets found by a court to be held in an implied, resulting, or constructive trust;

(viii) funds or other assets held by a court appointed conservator, guardian, receiver, trustee, or other fiduciary if:

(A) the conservator, receiver, guardian, trustee, or other fiduciary is responsible to the court in the same manner as a personal representative under Title 75, Chapter 3, Part 5, Supervised Administration, or as a receiver under Rule 66, Utah Rules of Civil Procedure;

(B) the conservator, trustee, or other fiduciary is a certified public accountant or has qualified for and received a designation as a certified financial planner, chartered financial consultant, certified financial analyst, or similar designation suitable to the court, that evidences the conservator's, trustee's, or other fiduciary's professional competence to manage financial matters;

(C) no trust company is willing or eligible to serve as conservator, guardian, trustee, or receiver after notice has been given pursuant to Section 75-1-401 to all trust companies doing business in this state, including a statement of the value of the assets to be managed. That notice need not be provided, however, if a trust company has been employed by the fiduciary to manage the assets; and

(D) in the event guardianship services are needed, the person seeking appointment as a guardian under this Subsection (1) is a specialized care professional, as that term is defined in Section 75-5-311, or a business or state agency that employs the services of one of those professionals for the purpose of caring for the incapacitated person, so long as the specialized care professional, business, or state agency does not:

(I) profit financially or otherwise from, or receive compensation for acting in that capacity, except for the direct costs of providing guardianship or conservatorship services; or

(II) otherwise have a conflict of interest in providing those services;

(ix) funds or other assets held by a credit services organization operating in compliance with Title 13, Chapter 21, Credit Services Organizations Act;

(x) funds, securities, or other assets held in a customer account in connection with the purchase or sale of securities by a regulated securities broker, dealer, or transfer agent; or

(xi) funds, assets, and other property held in a business trust for the benefit of holders of certificates of beneficial interest if the fiduciary activities of the business trust are merely incidental to conducting business in the business trust form.

(d) "Trust company" means an institution authorized to engage in the trust business under this chapter. Only the following may be a trust company:

(i) a Utah depository institution or its wholly owned subsidiary;

(ii) an out-of-state depository institution authorized to engage in business as a depository institution in Utah or its wholly owned subsidiary;

(iii) a corporation, including a credit union service organization, owned entirely by one or more federally insured depository institutions as defined in Subsection 7-1-103(8);

(iv) a direct or indirect subsidiary of a depository institution holding company that also has a direct or indirect subsidiary authorized to engage in business as a depository institution in Utah; and

(v) any other corporation continuously and lawfully engaged in the trust business in this state since before July 1, 1981.

(2) Only a trust company may engage in the trust business in this state.

(3) The requirements of this chapter do not apply to:

(a) an institution authorized to engage in a trust business in another state that is engaged in trust activities in this state solely to fulfill its duties as a trustee of a trust created and administered in another state;

(b) a national bank, federal savings bank, federal savings and loan association, or federal credit union authorized to engage in business as a depository institution in Utah, or any wholly owned subsidiary of any of these, to the extent the institution is authorized by its primary federal regulator to engage in the trust business in this state; or

(c) a state agency that is otherwise authorized by statute to act as a conservator, receiver, guardian, trustee, or in any other fiduciary capacity.

History: C. 1953, 7-5-1, enacted by L. 1981, ch. 16, § 6; 1982, ch. 6, § 1; 1986, ch. 1, § 11; 1989, ch. 267, § 26; 1991, ch. 133, § 14; 1994, ch. 200, § 37; 1995, ch. 49, § 24; 1997, ch. 161, § 1; 1998, ch. 39, § 1; 2003, ch. 301, § 1.

Amendment Notes. — The 1995 amendment, effective June 1, 1995, substituted "an out-of-state" for "a foreign" in Subsection (1)(d)(ii) and, in Subsection (3)(a), substituted "an institution" for "a person that is," substituted "that" for "or territory of the United States or in the District of Columbia which," and substituted "to fulfill" for "for the purpose of fulfilling."

The 1997 amendment, effective May 5, 1997, rewrote Subsection (1)(c)(viii), inserting "guardian" and "trustee; or other fiduciary" in the introductory phrase and substituting Subsections (1)(c)(viii)(A) to (D) for "if the conservatorship or receivership is under continuous court supervision and no trust company is willing or eligible to serve as conservator or receiver," and added Subsection (3)(c), making a stylistic change.

The 1998 amendment, effective July 1, 1998, substituted "Subsection 75-1-201(53)" for "Subsection 75-1-201(45)" in Subsection (1)(b).

The 2003 amendment, effective December 31, 2003, added Subsection (1)(d)(iii) and made related and stylistic changes.

Cross-References. — Business Trust Registration Act, Title 16, Chapter 15.

7-5-2. Permit required to engage in trust business — Exceptions.

(1) No trust company shall accept any appointment to act in any agency or fiduciary capacity, such as but not limited to that of personal representative, executor, administrator, conservator, guardian, assignee, receiver, depositary, or trustee under order or judgment of any court or by authority of any law of this state or as trustee for any purpose permitted by law or otherwise engage in the trust business in this state, unless and until it has obtained from the commissioner a permit to act under this chapter. This provision shall not apply to any bank or other corporation authorized to engage and lawfully engaged in the trust business in this state before July 1, 1981.

(2) Nothing in this chapter prohibits:

(a) any corporation organized under Title 16, Chapter 6a or 10a, from acting as trustee of any employee benefit trust established for the employees of the corporation or the employees of one or more other corporations affiliated with the corporation;

(b) any corporation organized under Title 16, Chapter 6a, Utah Revised Nonprofit Corporation Act, and owned or controlled by a charitable, benevolent, eleemosynary, or religious organization from acting as a

trustee for that organization or members of that organization but not offering trust services to the general public;

(c) any corporation organized under Title 16, Chapter 6a or 10a, from holding in a fiduciary capacity the controlling shares of another corporation but not offering trust services to the general public; or

(d) any depository institution from holding in an agency or fiduciary capacity individual retirement accounts or Keogh plan accounts established under Section 401(a) or 408(a) of Title 26 of the United States Code.

History: C. 1953, 7-5-2, enacted by L. 1981, ch. 16, § 6; 1982, ch. 6, § 2; 2000, ch. 300, § 5.

Amendment Notes. — The 2000 amendment, effective April 30, 2001, in Subsections (2)(a) and (2)(c) substituted "Chapter 6a or 10a" for "Chapter 6 or 10"; substituted "Chapter 6a, Utah Revised Nonprofit Corporation Act" for "Chapter 6" in Subsection (2)(b); and made a stylistic change.

17-21-6. General duties of recorder — Records and indexes.

(1) Each recorder shall:

(a) keep an entry record, in which the recorder shall, upon acceptance of any instrument, enter the instrument in the order of its reception, the names of the parties to the instrument, its date, the hour, the day of the month and the year of recording, and a brief description, and endorse upon each instrument a number corresponding with the number of the entry;

(b) keep a grantors' index, in which the recorder shall index deeds and final judgments or decrees partitioning or affecting the title to or possession of real property, which shall show the entry number of the instrument, the name of each grantor in alphabetical order, the name of the grantee, the date of the instrument, the time of recording, the kind of instrument, the book and page, and a brief description;

(c) keep a grantees' index, in which the recorder shall index deeds and final judgments or decrees partitioning or affecting the title to or possession of real property, which shall show the entry number of the instrument, the name of each grantee in alphabetical order, the name of the grantor, the date of the instrument, the time of recording, the kind of instrument, the book and page, and a brief description;

(d) keep a mortgagors' index, in which the recorder shall enter all mortgages, deeds of trust, liens, and other instruments in the nature of an encumbrance upon real estate, which shall show the entry number of the instrument, the name of each mortgagor, debtor, or person charged with the encumbrance in alphabetical order, the name of the mortgagee, lien holder, creditor, or claimant, the date of the instrument, the time of recording, the instrument, consideration, the book and page, and a brief description;

(e) keep a mortgagees' index, in which the recorder shall enter all mortgages, deeds of trust, liens, and other instruments in the nature of an

encumbrance upon real estate, which shall show the entry number of the instrument, the name of each mortgagee, lien holder, creditor, or claimant, in alphabetical order, the name of the mortgagor or person charged with the encumbrance, the date of the instrument, the time of recording, the kind of instrument, the consideration, the book and page, and a brief description;

(f) keep a tract index, which shall show by description every instrument recorded, the date and the kind of instrument, the time of recording, and the book and page and entry number;

(g) keep an index of recorded maps, plats, and subdivisions;

(h) keep an index of powers of attorney showing the date and time of recording, the book, the page, and the entry number;

(i) keep a miscellaneous index, in which the recorder shall enter all instruments of a miscellaneous character not otherwise provided for in this section, showing the date of recording, the book, the page, the entry number, the kind of instrument, from, to, and the parties;

(j) keep an index of judgments showing the judgment debtors, the judgment creditors, the amount of judgment, the date and time of recording, the satisfaction, and the book, the page, and the entry number; and

(k) keep a general recording index in which the recorder shall index all executions and writs of attachment, and any other instruments not required by law to be spread upon the records, and in separate columns the recorder shall enter the names of the plaintiffs in the execution and the names of the defendants in the execution.

(2) The recorder shall alphabetically arrange the indexes required by this section and keep a reverse index.

(3) The tract index required by Subsection (1)(f) shall be kept so that it shows a true chain of title to each tract or parcel, together with their encumbrances, according to the records of the office.

(4) Nothing in this section prevents the recorder from using a single name index if that index includes all of the indexes required by this section.

History: R.S. 1898 & C.L. 1907, § 620; L. 1915, ch. 45, § 1; C.L. 1917, § 1579; R.S. 1933 & C. 1943, 19-18-6; L. 1955, ch. 29, § 1; 1973, ch. 24, § 1; 1980, ch. 20, § 2; 1983, ch. 69, § 5; 1999, ch. 85, § 5; 2001, ch. 241, § 11.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, rewrote the section.

The 2001 amendment, effective April 30, 2001, in Subsection (1)(h) deleted "labeled 'powers of attorney'" near the beginning and added "and time" after "the date"; in Subsection (1)(j) deleted "labeled 'judgments', each page divided into columns headed, respectively" near the beginning and added "the book, the page, and the entry number" at the end; and made stylistic changes.

Cross-References. — Condominium projects, duty to keep index, § 57-8-12.

Federal tax liens, § 38-6-1.

Marketable record title, notice of claim of interest, § 57-9-5.

Recording as imparting notice, § 57-3-102 et seq.

STATUTE OF FRAUDS

25-5-1. Estate or interest in real property.

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

History: R.S. 1898 & C.L. 1907, §§ 1974, 2461; C.L. 1917, §§ 4874, 5811; R.S. 1933 & C. 1943, 33-5-1.

Cross-References. — Contract for sale of goods for $500 or more unenforceable in absence of some writing, § 70A-2-201.

Enforceability of security interests, § 70A-9-203.

Securities sales, statute of frauds inapplicable, § 70A-8-112.

Statute of frauds for kinds of personal property not otherwise covered, § 70A-1-206.

WRONGFUL LIEN

38-9-1. Definitions.

As used in this chapter:

(1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.

(2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.

(3) "Owner" means a person who has a vested ownership interest in certain real property.

(4) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder's records for the county in which the property is located.

(5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located.

(6) "Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

(a) expressly authorized by this chapter or another state or federal statute;

(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or

(c) signed by or authorized pursuant to a document signed by the owner of the real property.

History: C. 1953, 38-9-1, enacted by L. 1997, ch. 125, § 2.

Repeals and Reenactments. — Laws 1997, ch. 125, § 2, repeals former § 38-9-1, as enacted by Laws 1985, ch. 182, § 1, relating to the liability of a person filing a wrongful lien, and enacts the present section. See §§ 38-9-4 and 38-9-5 for present liability provisions.

57-1-12. Form of warranty deed — Effect.

Conveyances of land may be substantially in the following form:

WARRANTY DEED

_____ (here insert name), grantor, of _____ (insert place of residence), hereby conveys and warrants to _____ (insert name), grantee, of _____ (insert place of residence), for the sum of _____ dollars, the following described tract _____ of land in _____ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this _____ (*month/day/year*).

A warranty deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights, and privileges thereunto belonging, with covenants from the grantor, his heirs, and personal representatives, that he is lawfully seised of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs, and assigns in the quiet possession thereof; that the premises are free from all encumbrances; and that the grantor, his heirs, and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs, and assigns against all lawful claims whatsoever. Any exceptions to these covenants may be briefly inserted in the deed following the description of the land.

History: R.S. 1898 & C.L. 1907, § 1981; C.L. 1917, § 4881; R.S. 1933 & C. 1943, 78-1-11; L. 2000, ch. 75, § 20.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, updated the date line in the waranty deed form and made stylistic changes.

57-1-21. Trustees of trust deeds — Qualifications.

(1) (a) The trustee of a trust deed shall be:

(i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee to:

(A) request information about what is required to reinstate or payoff the obligation secured by the trust deed;

(B) deliver written communications to the lender as required by both the trust deed and by law;

(C) deliver funds to reinstate or payoff the loan secured by the trust deed; or

(D) deliver funds by a bidder at a foreclosure sale to pay for the purchase of the property secured by the trust deed.

(ii) any depository institution as defined in Section 7-1-103, or insurance company authorized to do business and actually doing business in Utah under the laws of Utah or the United States;

(iii) any corporation authorized to conduct a trust business and actually conducting a trust business in Utah under the laws of Utah or the United States;

(iv) any title insurance company or agency that:

(A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state;

(B) is actually doing business in the state; and

(C) maintains a bona fide office in the state;

(v) any agency of the United States government; or

(vi) any association or corporation that is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

(b) For purposes of this Subsection (1), a person maintains a bona fide office within the state if that person maintains a physical office in the state:

(i) that is open to the public;

(ii) that is staffed during regular business hours on regular business days; and

(iii) at which a trustor of a trust deed may in person:

(A) request information regarding a trust deed; or

(B) deliver funds, including reinstatement or payoff funds.

(c) Subsection (1) is not applicable to a trustee of a trust deed existing prior to May 14, 1963, nor to any agreement that is supplemental to that trust deed.

(d) The amendments in Chapter 209, Laws of Utah 2002, to this Subsection (1) apply only to a trustee that is appointed on or after May 6, 2002.

(2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

(3) The power of sale conferred by Section 57-1-23 may only be exercised by the trustee of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).

(4) A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under Section 57-1-22.

History: L. 1961, ch. 181, § 3; 1963, ch. 110, § 1; 1969, ch. 162, § 1; 1985, ch. 64, § 1; 1996, ch. 182, § 25; 2001, ch. 236, § 2; 2002, ch. 209, § 1; 2004, ch. 177, § 1.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, added the words

"active" and "residing in Utah" to Subsection (1)(a)(i); added "and actually doing business" in Subsections (1)(a)(ii) and (iv); added "and actually conducting a trust business" in Subsection (1)(a)(iii); added Subsections (3) and (4); and made stylistic changes.

The 2002 amendment, effective May 6, 2002, added Subsection (1)(a)(i)(B) and made related changes; rewrote Subsection (1)(a)(iv); added Subsections (1)(b) and (1)(d); redesignated former Subsection (1)(b) as (1)(c) and substituted "May 14, 1963" for "the effective date of this chapter"; and deleted "prior to the exercise of those powers" after "only if" in Subsection (4).

The 2004 amendment, effective May 3, 2004, substituted the ending to Subsection (1)(a)(i) beginning "maintains a place" for "(A) resides in Utah; or (B) maintains a bona fide office in the state" and made stylistic changes.

Coordination clause. — Laws 2002, ch. 209, § 8 directed the substitution of "Chapter 209, Laws of Utah 2002" for "this act" in Subsection (1)(d).

57-4a-4. Presumptions.

(1) A recorded document creates the following presumptions regarding title to the real property affected:

(a) the document is genuine and was executed voluntarily by the person purporting to execute it;

(b) the person executing the document and the person on whose behalf it is executed are the persons they purport to be;

(c) the person executing the document was neither incompetent nor a minor at any relevant time;

(d) delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording;

(e) any necessary consideration was given;

(f) the grantee, transferee, or beneficiary of an interest created or described by the document acted in good faith at all relevant times;

(g) a person executing a document as an agent, attorney in fact, officer of an organization, or in a fiduciary or official capacity:

(i) held the position he purported to hold and acted within the scope of his authority;

(ii) in the case of an officer of an organization, was authorized under all applicable laws to act on behalf of the organization; and

(iii) in the case of an agent, his agency was not revoked, and he acted for a principal who was neither incompetent nor a minor at any relevant time;

(h) a person executing the document as an individual:

(i) was unmarried on the effective date of the document; or

(ii) if it otherwise appears from the document that the person was married on the effective date of the document, the grantee was a bona fide purchaser and the grantor received adequate and full consideration in money or money's worth so that the joinder of the nonexecuting spouse was not required under Sections 75-2-201 through 75-2-207;

(i) if the document purports to be executed pursuant to or to be a final determination in a judicial or administrative proceeding, or to be executed pursuant to a power of eminent domain, the court, official body, or condemnor acted within its jurisdiction and all steps required for the execution of the document were taken; and

(j) recitals and other statements of fact in a document, including without limitation recitals concerning mergers or name changes of organizations, are true.

(2) The presumptions stated in Subsection (1) arise even though the document purports only to release a claim or to convey any right, title, or interest of the person executing it or the person on whose behalf it is executed.

History: C. 1953, 57-4a-4, enacted by L. 1988, ch. 155, § 22; 1989, ch. 88, § 11.

75-7-816. Recitals when title to real property is in trust — Failure.

(1) When title to real property is granted to a person as trustee, the terms of the trust may be given either:

(a) in the deed of transfer; or

(b) in an instrument signed by the grantor and recorded in the same office as the grant to the trustee.

(2) If the terms of the trust are not made public as required in Subsection (1), a conveyance from the trustee is absolute in favor of purchasers for value who take the property without notice of the terms of the trust.

(3) The terms of the trust recited in the deed of transfer or the instrument recorded under Subsection (1)(b) shall include:

(a) the name of the trustee;

(b) the address of the trustee; and

(c) the name and date of the trust.

(4) Any real property titled in a trust which has a restriction on transfer described in Section 25-6-14 shall include in the title the words "asset protection trust."

History: C. 1953, 75-7-816, enacted by L. 2004, ch. 89, § 97.

Effective Dates. — Laws 2004, ch. 89, § 123 makes the act effective on July 1, 2004.

75-7-409. Recitals when title to real property is in trustee — Failure.

(1) When title to real property is granted to a person as trustee, the terms of the trust may be given either:

(a) in the deed of transfer; or

(b) in an instrument signed by the grantor and recorded in the same office as the grant to the trustee.

(2) If the terms of the trust are not made public as required in Subsection (1), a conveyance from the trustee is absolute in favor of purchasers for value who take the property without notice of the terms of the trust.

History: C. 1953, 75-7-409, enacted by L. 1985, ch. 14, § 2.

Compiler's Notes. — This section is not part of the official text of the Uniform Trustees' Powers Act.

78-12-25. Within four years.

An action may be brought within four years:

(1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1);

(3) for relief not otherwise provided for by law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-25; L. 1988, ch. 59, § 14; 1996, ch. 79, § 110.

Cross-References. — Antitrust Act actions, § 76-10-925.

Product Liability Act, statute of limitations, § 78-15-3.

78-40-1. Action to determine adverse claim to property — Authorized.

An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-1.

Cross-References. — Action brought in county where property situated, § 78-13-1.

Allowance for improvements made under color of title, §§ 57-6-1 et seq., § 78-40-5.

Jurisdiction in district courts, Utah Const., Art. VIII, Sec. 5; § 78-3-4.

Limitations of actions, § 78-12-1 et seq.

Tax sales of real property, § 59-2-1303 et seq.

ADDENDUM DOCUMENT "13" – Trial Court's Ruling and Order of March 22, 2004

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

FOREST MEADOW RANCH PROPERTY OWNERS ASSOCIATION, LLC, Petitioner, vs. PINE MEADOW RANCH HOME ASSOCIATION et.al., Respondents.	**RULING and ORDER** Case No. 000600092 Honorable BRUCE C. LUBECK DATE: March 22, 2004

The above matter came before the court on March 15, 2004, for oral argument on Petitioner's and Respondents' cross motions for summary judgment and petitioner's motion to strike. Plaintiff was present through Boyd Kimball Dyer, and Defendant was present through Edwin C. Barnes.

BACKGROUND

Petitioner originally sought summary relief to nullify wrongful liens. The liens arise as a result of Petitioner's alleged failure to pay association fees to Respondent and Respondent's filing of a lien against Petitioner's property based on such failure to pay fees.

Petitioner is a record interest holder in lot 105A Forest Meadow Ranch Plat "D" (Lot 105A-D), which was originally part of Lot 105 that has been subdivided into approximately 500 lots.

In 1965, Security Title Company (Security) as "Trustee" not named on the warranty deed received by that warranty deed several square miles of real property from F.E. Bates and Mae P. Bates. That land was later subdivided and became the Forest Meadow subdivision and Pine Meadow subdivision. Security Title was listed on the deed as "Trustee" and no beneficiary was named.

On March 10, 1971, Deseret created its Articles of Incorporation, signed by W. Brent Jensen (Jensen), and those were filed with the Secretary of State on March 18, 1971. On July 8, 1971, the Declaration of Covenants, Conditions and Restrictions (CCRs) was signed by Jensen. On July 22, 1971, Jensen filed and recorded, on behalf of Deseret Diversified Development for Forest Meadow Ranch the CC&R's for southern part of the subdivision (Forest Meadow CC&R's). The CCRs provided that Deseret was the

owner of the land and the Forest Meadow Ranch Property Owners Association and assigns would administer and enforce the CCRs. The Forest Meadow CCRs further stated:

> The reservations and restrictive covenants herein set out are to run with the land and shall be binding upon all persons owning or occupying any lot, parcel or portion of the real property enumerated at the beginning hereof until January 1, 1990, and for successive twenty (20) year periods unless within six (6) months of the end of the initial period or any twenty (20) year period thereafter a written agreement executed by the then record owners of more than three-quarters (3/4) in area of said real property included herein is recorded with the Summit County Recorder . .

There was no reference to association assessments in the Forest Meadow CCRs. On July 20, 1971, plat D was signed by Deseret and Security as owners, and on August 9, 1972, that Forest Meadow Ranch plat was recorded (plat). The plat was signed by Deseret Development by Jensen, President; Lee Ann Hunter, secretary of Deseret; and by two Security Title Company employees as Trustees. The plat stated:

> Know all men by these presents that we, the four undersigned owners of the above described tract of land, having caused the same to be subdivided into lots & streets hereafter to be known as: FOREST MEADOW RANCH, PLAT "D" do hereby dedicate for perpetual use of the public all parcels of land shown on this plat as intended for public use.

The plat further stated under the SUBDIVIDERS NOTE:

> The recording of this plat shall not constitute a dedication of roads and street or rights of way to public use. It is intended that all streets shown hereon shall remain the property of the subdivider, Deseret Diversified Development, Inc. - and shall be completely maintained by said owners.

Forest Meadow Ranch Landowners Association (Petitioner) was formed as the homeowners association for the Forest Meadow subdivision. Lot 105A-D is partly within the North half of Section 22, Township 1 North, Range 4 East, Salt Lake Base and Meridian and partly in the South half of said section.

On August 14, 1973, Jensen and Vincent B. Tolman created the Pine Meadow Ranch Homeowners Association to act as the homeowners association for the Pine Meadow Subdivision (Pine Meadows Association).

On September 28, 1973, Jensen on behalf of Pine Meadows Association recorded CCRs for the northern part of the subdivision in the name of Pine Meadow Ranch, Inc. (PMRI CCRs). The PMRI CCRs state:

> [A]ll of the properties described above shall be held, sold and conveyed subject to the following easements, restrictions, covenants, and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the real property and be binding on all parties having any right, title or interest in the described properties or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each owner thereof.

The PMRI CCRs provided the rights of the Pine Meadows Association, which include right to make assessments, lot owners personal obligation to pay assessments and Respondent's ability to impose liens against the property for failure to pay such assessments.

Pine Meadow and Forest Meadow subdivisions have always shared a common water and roadway system.

On January 15, 1975, a special warranty deed was recorded to convey title in Lot 105 from Security Title Company, Trustee to Jensen Investment. Title conveyed was "subject to easements, restrictions and rights of way appearing of record or enforceable in law and equity and taxes for the year 1975 and thereafter."

On January 16, 1975, a deed was recorded from Jensen Investment conveying the east half of lot 105A-D to Clifton Emmet Clark and Sharon M. Clark (Clarks) by quitclaim deed. That same day, another entry was made relating to the east half of Lot 105A-D, a conveyance by Jensen Investment to the Clarks of the same portion by warranty deed. On July 23, 1975, the Clarks reconveyed by quitclaim deed the east half of Lot 105A-D back to Jensen Investment.

On July 22, 1975, recorded on July 23, 1975, Jensen Investment conveyed by warranty deed Lot 105A-D to Harold E. Waldhouse and Maylene C. Waldhouse (Waldhouses).

Respondent claims that Pine Meadow Association and Forest Meadow Association merged by majority shareholder vote on May 30, 1978 (the Association or Respondent). Petitioner disputes such merger occurred because there are no certified copies of the Articles of Merger from the Utah Division of Corporations and Commercial Code. That dispute is not necessary to resolve in this case.

Respondent claims that the record chain title owner at the time of the merger, Clifton Emmet Clark and Sharon M. Clark (Clarks), voted in favor of and supported the merger of the Associations. Petitioner disputes this arguing that the Clarks no longer owned the property at the time of the merger.

On December 12, 1988, recorded on December 13, 1988, the Waldhouses conveyed by warranty deed title to 105A-D to Shelley J. Oakason a/k/a Shelley J. Liftos (Oakason) reserving oil, gas, and mineral rights.

On October 29, 1998, a warranty deed dated October 15, 1998, was recorded conveying title from Oakason to Axel Grabowski (Grabowski). Grabowski took title "[s]ubject to easements, restrictions and rights of way appearing of record. . . ."

On December 9, 1999, Grabowski conveyed title to Lot 105A-D to Petitioner herein by quitclaim deed, which was recorded on December 10, 1999. The named petitioner herein is made up only of Grabowski.

Since the alleged merger, the Association has operated as the homeowners' association for the 800 plus lots, homes and cabins in the Pine Meadow and Forest Meadow Subdivisions. Lot ownership has been the basis for membership in the Association, including assessments and notice of and the right to vote at the Association's annual meetings. The Association has assessed lots to pay for its operations and has received payment of assessments from lot owners. Respondent claims that the primary responsibility of the Association is to own, maintain and insure the road system in the Pine Meadow Ranch area for the benefit of all the Association's members and their invitees. Petitioner disputes this and claims that the roads are owned by the lot owners. (Even if the roads are owned by the lot owners, the issues here relate to whether the CCRs reflected the Association's duty to own, maintain and insure the road system.)

The Association also owns, maintains and insures a substantial amount of open space for the benefit of its members.

In October 1985, the Summit County Commission determined to establish the Pine Meadow Special Service District (the "SSD") for the provision of water service and the maintenance of roadways in the Pine Meadow areas for the benefit of the lot owners. Predecessor owners of Forest Meadow Lot 105 paid taxes to and received benefits from the SSD. The SSD was dissolved by vote of the Summit County Commission in the spring of 2000. On March 20, 2000, the SSD executed a "Deed of Easement" conveying to the Association, an easement for the operation and maintenance of "public roads connecting such roads and ways to the Pine Meadow and Forest Meadow Subdivisions, including the road known as Tollgate Canyon Road." In *Pine Meadow Ranch Owners Association, Inc. v. Summit County*, Utah Third District Court, Summit County, case no. 6181, the Court concluded that the roads within Pine Meadow and Forest Meadow subdivisions are private roads, not public.

Since the conveyance from the SSD, the Association has maintained, improved and insured the roadways in the Pine Meadow and Forest Meadow subdivisions and has continued to own and insure open space, and to extend power lines and provide other benefits for its members. The Association has continued to assess and receive payment for fees. The Association has spent hundreds of thousands of dollars and currently has an annual budget of $140,000.

On July 25, 1980, the Association republished the Forest Meadow and PMRI CCRs in the form of a "Notice of Lien" (Lien Notice). Petitioner disputes that the CCRs were merely to confirm public notice of the CCRs, rather it expands the powers of Respondent to make assessments. Since recording the Lien Notice, the Association has continued to collect its assessments and perform its other functions.

In 2003, the Association recorded a "Clarification of Notice of Lien" (Clarification) confirming that the Lien Notice was intended merely to republish the existing CCRs and other encumbrances of record and not to create any new charge or encumbrance on any property. Petitioner disputes that the Clarification clarifies anything. Petitioner claims that the Clarification is a new wrongful lien because by its terms it makes a claim that Respondent has title to the roadways in disregard of the rights of the lot owners who have record title to the roads.

PROCEDURAL HISTORY

On March 6, 2000, Petitioner filed a petition to nullify

wrongful liens against the Association with regard to the Notice Lien. On March 20, 2000, the court heard oral arguments on the sufficiency of the petition and affidavit under the Utah wrongful lien statute. On March 27, 2000, the court ruled that Petitioner's petition for summary relief be denied because if Petitioner's claim was correct, then approximately 500 lots may be similarly situated as Petitioner's lot 105A-D and the relief requested exceeded the remedy of a summary proceeding because Petitioner sought damages. The court entered an Order on this Ruling on May 18, 2000, and *sua sponte* granted Petitioner leave to amend as a non summary proceeding within thirty days.

On May 17, 2000, Petitioner filed an amendment to Petition for Summary Relief to Nullify Wrongful Lien pursuant to the Utah wrongful lien statute, Utah Code § 38-9-1 *et seq.* modifying Petitioner's prayer for relief to limit the petition to: (1) the issue of whether the 1980 Notice Lien is a "wrongful lien" as defined by the Utah Wrongful Line Statute and (2) if the court finds it to be a wrongful lien, the issue of what relief is in accordance with the facts and the law. Petitioner requested that the court permit discovery limited to those issues and upon completion of discovery the court hold a non-summary hearing on those issues. Petitioner seeks a declaration that the CCRs recorded in 1971 and 1973 are void and petitioner should not be required to pay any assessments.

The parties engaged in discovery.

On October 14, 2003, Petitioner filed its motion for summary judgment.

On December 10, 2003, Respondent filed its cross motion for summary judgment and opposition to Petitioner's motion for summary judgment.

On December 16, 2003, Petitioner filed its reply memoranda in support of its motion for summary judgment. That same day, Petitioner filed a motion to strike Respondent's cross motion for summary judgment and opposition to Petitioner's motion for summary judgment because it failed to comply with former Utah R. Jud. Adm. 4-501 (now known as Utah R. Civ. P. 7(c)). Specifically, Petitioner argued that Respondent's memoranda failed to comply with the motion practice rule because it combined its cross motion for summary judgment with its opposition to Petitioner's motion.

On January 5, 2003, Respondent filed its opposition to Petitioner's motion to strike. Respondent argued that for the

sake of judicial economy and the parties, the court should allow Respondent to respond in a combined memoranda.

On January 7, 2004, Petitioner filed its reply memorandum in support of its motion to strike.

LAW

When both parties move for summary judgment, the court is not bound to grant it to one side or another. *Diamond T. Utah, Inc. v. Travelers Indem. Co.*, 441 P.2d 705 (1968). Cross motions for summary judgment do not warrant the court's granting of summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed. *Amjacs Interwest, Inc. v. Design Assocs.* , 635 P.2d 53 (Utah 1981).

Cross motions may be viewed as involving a contention by each movant that no genuine issues of material fact exists under the theory it advances, but not as a concession that no dispute remains under the theory advanced by its adversary. *Wycalis v. Guardian Title*, 780 P.2d 821 (Utah Ct. App. 1989); *cert. denied*, 789 P.2d 33 (Utah 1990). In effect, each cross movant implicitly contends that it is entitled to judgment as a matter of law, but that if the court determines otherwise, factual disputes exist that preclude judgment as a matter of law in favor of the other side. *Id.*

The court has discretion to decide whether to allow memoranda not in conformance with the rules.

Section 57-3-103 (2000) of the Utah Recording Act provides:

> Each document not recorded as provided in this title is void as against any subsequent purchaser of the same property, or any portion of it, if: (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration, and (2) the subsequent purchaser's document is first recorded.

Section 57-4a-4 provides:

> A recorded document creates the following presumptions regarding title to the real property affected: . . . .(e) any necessary consideration was given; (f) the grantee, transferee, or beneficiary of an interest created or described in the document acted in good faith at all relevant times; . . . .

Covenants that run with the land must have the following characteristics: (1) the covenant must touch and concern the land; (2) the covenanting parties must intend the covenant to run with the land; and (3) there must be privity of estate. *Flying Diamond Oil Corporation v. Newton Sheep Company*, 776 P.2d 618, 622-23 (Utah 1989). However, the law of covenant running with the land has long been a source of some confusion. *Id.* "For a covenant to run in equity, it must 'touch and concern' the land, and there must be an intent that it run. Privity is not required, but the successor must have notice of the covenant." *Id.* at 623 n.6. Although the touch and concern and intent requirements are somewhat interrelated, the absence of any one of the requirements prevents a covenant from running with the land. *Id.* at 623.

> Not every covenant binds subsequent owners or users of the land, even though the covenant purports to be a covenant that runs with the land. The effect of the touch-and-concern requirement is to restrict the types of duties and liabilities that can burden future ownership of interests in the land. The touch-and-concern requirement focuses on the nature of the burdens and benefits that a covenant creates. What is essential is that the burdens and benefits created must relate to the land and the ownership of an interest in it; the burdens and benefits created are not the personal duties or rights of the parties to a covenant that exist independently from the ownership of an interest in the land. . . .
>
> [T]o touch and concern the land, a covenant must bear upon the use and enjoyment of the land and be of the kind that the owner of an estate or interest in land may make because of his ownership right.

Id. at 623-24.

The original parties to the covenant must have intended that the covenant run with the land. *Id.* at 627. The parties intent may be determined by an express statement in the document or implied by the nature of the covenant itself. *Id.* At first blush, a covenant to pay may appear personal, however, a promise to pay may touch and concern the land if its purpose is to benefit the covenantor's interest in the land, *e.g.*, the establishment of an easement may touch and concern the land, a covenant to pay for the use of an easement may be part of a covenant running with the land. *Id.* at 625.

Privity of estate is also required. *Id.* at 628. There are three types of privity of estate: (1) mutual, *e.g.*, a covenant

arising from simultaneous interests in the same land; (2) horizontal, *e.g.*, a covenant created in connection with a conveyance of an estate from one of the parties to another and (3) vertical, *e.g.*, the devolution of an estate burdened or benefitted by a covenant from an original covenanting party to a successor. *Id.* "[Vertical privity] arises when the person presently claiming the benefit, or being subjected to the burden, is a successor to the estate of the original person so benefitted or burdened." *Id.* A strict approach to privity has been abandoned and substance prevails over technical form, *e.g.*, a homeowner's association which had no interest in property at all can sue to enforce a covenant. *Id.*

> Restrictive covenants that run with the land and encumber subdivision lots form a contract between subdivision property owners as a whole and individual lot owners; therefore, interpretation of the covenants is governed by the same rules of construction as those used to interpret contracts.

Swenson v. Erickson, 998 P.2d 807, 810-11 (Utah 2000).

> Restrictive covenants are enforceable in equity against all those who take the estate with notice of them, although they may not be, strictly speaking, real covenants so as to run with the land or of a nature to create a technical qualification of the title conveyed by the deed. The question is not whether the covenant runs with the land, but whether a party will be permitted to use the land in a manner inconsistent with the contract entered into by his or her vendor, where the purchase was made with notice of such covenant. The enforcement of restrictive covenants or equitable servitudes is based on the principle of notice; that is, a person taking title to land with notice of a restriction upon it will not, in equity and good conscience, be permitted to violate such restriction. . . .
>
> Constructive or actual notice of a restrictive covenant imposed in furtherance of a building or development scheme, on the part of one against whom enforcement is sought is essential. Accordingly, restrictions on the use of land in a subdivision embraced by a general plan of development can be enforced against a subsequent purchaser who takes title to the land with notice of the restriction. . . .
>
> A purchaser with notice of restrictive covenants upon land is bound by such restrictions, although they are not such as in strict legal contemplation run with

> the land. Thus, even though a covenant does not run with the land, it may be enforceable against a transferee of the covenantor who takes with knowledge of its terms under circumstances which would make it inequitable to permit avoidance of the restriction. Such a covenant is binding on a purchaser with notice not merely because such purchaser stands as an assignee of the party who made the agreement, but because he or she has taken the estate with notice of a valid agreement concerning it. The enforcement against a purchaser with notice rests upon the principle that it would be inequitable to permit such an owner, while enjoying the fruits of and claiming under the grant, part of the consideration for which was the benefit promised by the covenant, to destroy such benefit by violating the covenant.

20 Am. Jur. 2d Covenants §§ 266-67(1995).

ARGUMENTS

Petitioner argues that Deseret did not have record title to Lot 105 at the time it recorded Forest Meadows CCRs to the property, therefore, having no recorded deed to the property it was unable to bind the lot with CCRs that would run with the land. When Deseret recorded the CCRs in 1971, it had notice that record title to the land was held by Security. If Deseret wanted to bind the lot with covenants running with the land, it knew to obtain a deed and record it, but failed to do so. Therefore, Petitioner argues that Petitioner's chain of title is superior to Respondent's and the CCRs do not apply to Petitioner. Petitioner argues that only if Deseret had fee simple title could it bind the land with such covenants. Because Deseret had no privity of estate, it could not bind the land. Petitioner argues that Security was listed as Trustee in the 1965 warranty deed from Bates, and because there are no contemporaneous documents showing Security was Trustee for Deseret, the court is to disregard the word "Trustee" and the court should simply read the 1965 warranty deed to be from Bates to Security, who was the fee simple owner in 1971 when Jensen and Deseret purported to create the CCRs. Petitioner calls this the doctrine of "descriptio personae." See, e.g., *TWN, Inc., v. Michele*, 66 P.3d 1031 (Utah App. 2003).

Petitioner also argues that the 1971 CCRs only covered a portion of the development, and that in part is why other CCRs were filed in 1973, and that act further indicates that the 1971 CCRs were not valid. Petitioner also argues that the attempt by Respondent to have the court determine who could validly file CCRs in 1971 and 1973 should be rejected because the CCRs and

plats filed with the recorder do nothing more than give inquiry notice that perhaps others have an interest in the land. However, without a deed, Deseret cannot be heard to claim they owned the land such that they can bind it with CCRs.

Respondent argues that Petitioner lacks standing to challenge the CCR's because it took title to Lot 105A-D subject to easements, restrictions and rights of way appearing of record from Grabowski, who received title from Oakson. Furthermore, Respondent argues that the Petitioner's predecessors paid association dues and this confirms their acceptance of and agreement with the CCR's. Respondent also argues that the Clarks voted in favor of and supported the merger of associations. Respondent argues that the recording of CCRs does not purport to document conveyance of a property interest. Instead the CCRs are a contract established by a prior owner which affects property and is construed under the principles of contract law that such restrictive covenants run with the land and encumber subdivision lots form a contract between subdivision property owners as a whole and individual lot owners. Moreover, Respondent argues that restrictive covenants are enforceable in equity when a purchaser has notice of such covenants at the time of purchase. Here, Petitioner had notice of the CCRs and Lien Notice prior to receiving its property interest in 105A-D, therefore, it took such interest subject to the CCRs. Respondent argues that Petitioner has not offered any evidence to overcome the presumption that Deseret was owner or developer at the time the CCRs were recorded. Respondent argues that the recorded subdivision plat confirms that Deseret and Security had mutuality of estate and interest in the ownership of Lot 105 which is presumed to be true because it is a recorded document and Petitioner fails to rebut that presumption. Respondent footnotes that if the court grants Petitioner's petition that it will be unable to do what it is supposed to by assessing fees and maintaining the roads and common areas, therefore, the subdivision will collapse and result in anarchy.

Petitioner replies that under Utah law, the words "subject to easements, restrictions and rights of way currently of record" only limit the warranty given in a deed, they do not create any interest. Such a phrase does not convey anything to anyone, therefore, such phrase does not validate the 1971 CCRs. Clarks' vote on the merger is irrelevant because he did not own Lot 105A-D at the time of the vote and the merger of the two homeowners' associations had nothing to do with the validity of the 1971 CCRs and the vote could not convey any interest in real property. Petitioner also argues that the CCRs are an interest in real property in the nature of an equitable servitude or real

covenant, not as Respondent claims, merely a matter of contract. Petitioner argues that actual notice is insufficient to validate the CCRs, compliance with the Recording Act is required. Petitioner also argues that equitable title to land by Deseret through Security as Trustee is contrary to Utah law and factually impossible because Deseret did not exist at the time that the Bates conveyed title to Security. Petitioner argues that the only way that Deseret could have acquired any interest in the land was by deed or written instrument, and if any such deed or instrument ever existed, it is now void because it was not timely recorded. Petitioner argues that in order for covenants to bind a subsequent purchaser like Petitioner, there must be vertical privity of estate between the owner who was originally bound by them and the subsequent purchaser. Petitioner argues that the CCRs are not binding on Petitioner because there is no vertical privity of estate between Deseret and Petitioner. Petitioner asserts that the presumption of UCA 57-41-4 applies to the warranty deed also, and it is at odds with the presumption concerning the CCRs and so the deed should govern. Finally, Petitioner argues that the court should reject Respondent's argument that it must be able to make mandatory assessments or the subdivisions will collapse because it is the classic justification for tyranny.

DISCUSSION

1. PLAINTIFF'S MOTION TO STRIKE.

CJA 4-501 was repealed effective November 1, 2003, and its substance was enacted in URCP Rule 7(c). The court has discretion in requiring compliance with the rules formerly and even though now enacted in a rule of procedure, the court feels the same. Although Rule 7 does not technically provide for an opposition to a motion for summary judgment to be filed combined with a cross motion for summary judgment, the court agrees with defendants that for judicial economy such is a practical approach. The court will consider all of the pleadings of the parties.

Therefore, the court DENIES plaintiff's motion to strike.

2. CROSS MOTIONS FOR SUMMARY JUDGMENT.

There appear to be factual disputes about some of those issues, but the parties indicate and argue that there are no facts to try. In part because of the age of these activities, the parties agree that the court should and must decide these issues

as a matter of law on the record before it.

(1) The court concludes that the cases relied on by Petitioner do not govern this proceeding.

Petitioner relies upon *TWN, Inc., v. Michel, supra*, 66 P.3d 1031, where parties both asserted ownership of a parcel that was passed to one party's predecessor in interest by "Richard A Christenson, Trustee" and the other parcel passed to the other party's predecessor in interest by "Richard A. Christensen." The issue in *TWN* was whether a grantor's unexplained placing of the word "trustee" next to his or her name on a real property deed results, as a matter of law, in conveyance of only a trust interest. The court concluded that the "descriptio personae" doctrine applied which is when "certain terms sometimes added to a person's name [that] are merely descriptive matter intended to clarify the identity of the person, but their use or non-use should generally play no part in the validity of the conveyance." *Id.* at 1033. The concept of descriptio personae has long been recognized to the identification of parties on real property deeds. *Id.* at 1034. The court concluded that the unexplained word "trustee" on a real property deed does not, absent other circumstances suggesting the creation or existence of a trust, create a trust or implicate only a trust interest. *Id.* The Court also noted that UCA § 75-7-402(5) authorizes a trustee to dispose of trust property "in the name of the trustee as trustee." But something more is required, *e.g.*, "in my capacity as trustee for the XYZ trust," or alternatively a party may resort to extrinsic evidence to show that a trust was in fact intended.

Here, there is no competing title interests in property. There is no dispute that Petitioner is the record title holder to the property. It is undisputed that Petitioner's title traces back to Security Title. It is undisputed that Security Title's name is on the deed as trustee. However, here, other circumstances exist that did not exist in *TWN*. Specifically, the name of the trustee, Security Title, was one that would generally be seen as a trustee, not a property owner. A title company often holds title to property as trustee. Furthermore, the recorded plat map reflected Deseret as the owner of the property and Security Title as trustee. The recorded plat map clearly reflects Security Title as the trustee of the property and Deseret as owners of the property. Moreover, it is undisputed that Deseret had recorded CCRs with protective covenants and listed Deseret as owner of the land. The court concludes that the word "trustee" under the circumstances surrounding this case reflected the existence of a trust and that Deseret was the

beneficiary and owner of the property.

Petitioner also relies upon *Dunlap v. Stichting Mayflower Mountain Fonds,* 76 P.3d 711 (Utah App. 2003), where the parties both asserted ownership of a mining claim through differing chains of title. Here, as previously stated there is no competing title interest. There is no dispute that Petitioner is the record title holder to the property.

Petitioner also relies upon *Flying Diamond Oil Corp. v. Newton Sheep Company*, 776 P.2d 618 (Utah 1989). In that case, the parties conflict involved an agreement regarding the surface right of land. The court concluded that the agreement governing the surface right of the land created a covenant, which ran with the land because it touched and concerned the land, it was the intent of the original parties, there was privity of estate, and the agreement was in writing. Petitioner argues that here, there is no privity of estate.

The court is not persuaded. Applying substance over form, there is vertical privity of estate. As stated above, under the circumstances, it is clear that Security Title was Trustee for Deseret. Deseret recorded the CCRs as owner. Petitioner's successor in interest received title from Security Title as Trustee for Deseret. Deseret expressly stated that "the reservations and restrictive covenants herein set out are to run with the land and shall be binding upon all persons owning or occupying any lot . . . ." Later, Pine Meadow's CCRs expressly stated that "all of the properties . . . shall be held, sold and conveyed subject to the following easements, restrictions, covenants, and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the real property." Clearly, these covenants touched and concerned the land and the express intent was for them to do so. Accordingly, as in *Flying Diamond*, the CCRs run with the land and Petitioner is bound by them.

The basic argument by the Association is that competing titles are not involved in those cases, and here title is clear in Petitioner, but such title is burdened by the prior recorded covenants.

The court agrees that this fact situation is not one of competing titles. The warranty deed of 1965 indeed names Security Title as Trustee and it does not name who it is trustee for. However, other documents, some executed by Security Title, later demonstrate that the CCR's signed by Jensen on behalf of Deseret show Security believed it was fee simple owner only for

Deseret, even though Deseret did not exist in 1965. Extraneous and reasonably contemporaneous evidence shows that Security was not the intended owner in fee simple and the word Trustee by its name does more than describe Security. It shows Security's interest and while it alone does not create a trust interest, other evidence and documents show Deseret had an interest in the land. Deseret has not attempted to do anything to the land inconsistent with its own ownership interest. Security could have done the same thing to the land. Deseret does not claim title. It merely encumbered the land which it could do as owner. Title companies are in the business of holding title in trust for someone or some other entity. The CCRs here make clear that anyone who buys this land takes it subject to certain restrictions, which is again not out of the ordinary. Deseret has done more than merely "claim" an interest in the land. That claim was verified and confirmed by the trustee Security when it signed the plat.

(2) The court does not accept the "anarchy" argument of Respondent, but does believe that because assessments have been ongoing for many years, and because Respondent has been maintaining roads and open spaces, and because property owners have been paying assessments to the SSD and to respondent since dissolution of the SSD, Petitioner's claim must fail. Clearly, the covenants touch and concern the land. Petitioner's predecessors in interest benefitted from those roads and open spaces. Petitioner benefits from the work of the Association. It is clear that Deseret's intent was for the roads and open spaces to benefit the subsequent property owners of the subdivided property. As stated above, vertical privity exists. Nevertheless, even if there was no vertical privity, as a matter of equity, the court agrees with Respondent that prior predecessors in interest have treated the covenants as covenants that run with the land and so must Petitioner. A challenge to these covenants over thirty years later is untimely and must be barred.

(3) Property law does not fully govern here, but contract principles emerge and where Petitioner bought the land with notice it did so subject to certain restrictions, Petitioner ought to be bound by those restrictions. Prior to subdividing the property Deseret recorded the plats and CCRs. The initial transfer from Security Title was granted in 1975. This was several years after the plats and CCRs were recorded. Petitioner's predecessors in interest paid the assessments and enjoyed the roads and open spaces as a result thereof. Petitioner has also had the right to enjoy the roads and open spaces. There is no dispute that Petitioner had notice of the

restrictions at the time it received the property. Moreover, Petitioner took the property by quit claim deed from Grabowski who took the property "[s]ubject to easements, restrictions and rights of way appearing of record. . . ." For Petitioner now to claim that those restrictions should not apply to it is not persuasive. The restrictions were recorded long before Petitioner obtained title. It would be inequitable to permit Petitioner, while enjoying the fruits of such restrictions, to not comply with the restrictions when Petitioner had notice of them at the time it obtained title.

(4) Petitioner claims ownership of a lot of land conveyed by Deseret. At the same time Petitioner claims that CCRs created by Deseret do not apply to Petitioner. As discussed in (1), (2) and (3), the court does not agree.

Based on the above, the court DENIES the motion for summary judgment of Petitioner and GRANTS the motion of Respondent for summary judgment.

Respondent is to prepare an order in compliance with URCP, Rule 7(f).

DATED this 22 day of November, 2004.

BY THE COURT:

BRUCE C. LUBECK
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000600092 by the method and on the date specified.

METHOD	NAME
Mail	EDWIN C BARNES ATTORNEY DEF 201 S MAIN ST 13TH FLOOR SALT LAKE CITY, UT 84111-2216
Mail	BOYD KIMBALL DYER ATTORNEY PLA 664 NORTHCLIFFE CIRCLE SALT LAKE CITY UT 84103

Dated this 22nd day of March, 2004.

Deputy Court Clerk

00382